BEFORE THE
ILLINOIS COMMERCE COMMISSION

ACN Communications Services, Inc.	**)**	
and CoreComm Illinois, Inc.	**)**	
	)	
vs.	**)**	**Docket No. 04-0421**
	)	
Verizon North, Inc. and Verizon South, Inc.	**)**	
	)	
IN THE MATTER OF A COMPLAINT	**)**	
AND PETITION FOR AN EXPEDITED	**)**	
ORDER THAT VERIZON	**)**	
REMAINS REQUIRED TO PROVISION	**)**	
UNBUNDLED NETWORK ELEMENTS	**)**	
ON EXISTING RATES AND TERMS	**)**	
PENDING THE EFFECTIVE DATE	**)**	
OF AMENDMENTS TO THE	**)**	
PARTIES' INTERCONNECTION	**)**	
AGREEMENTS PURSUANT TO	**)**	
220 ILCS 5/10-101 AND 10-108	**)**	

ANSWER AND MOTION TO DISMISS OF
VERIZON NORTH INC. AND VERIZON SOUTH INC.

Verizon North Inc. and Verizon South Inc. ("Verizon") hereby respond to the Complaint and Petition filed by ACN Communications Services, Inc. and CoreComm Illinois, Inc. ("Petitioners"). The Petitioners, *who do not even claim that they themselves have entered into interconnection agreements with Verizon in Illinois,* apparently seek an order unlawfully abrogating the existing interconnection agreements that Verizon has with *other* carriers. [1] They ask this Commission to require Verizon to provide blanket access to the unbundled network elements ("UNEs") that make up UNE Platform "(UNE-P") at total element long run incremental cost ("TELRIC") rates, even after the issuance of the D.C. Circuit's mandate in

[1] Neither ACN Communications Services, Inc. nor CoreComm Illinois, Inc. appears to have entered into an interconnection agreement with Verizon in Illinois, either by negotiating their own agreements or by opting into a preexisting agreement pursuant to 47 U.S.C. § 252(i). Significantly, these carriers do not attach to their Complaint and Petition copies of interconnection agreements, but instead offer as their supporting "evidence" a legal memo.

United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*) eliminates the obligations, and even where Verizon would no longer be required to do so under the terms of a specific interconnection agreement.

Petitioners purport merely to "preserve the *status quo*," (Complaint and Petition at 3), but what Petitioners actually seek is to *change* the status quo by asking this Commission to relieve them from the terms of interconnection agreements that they signed and the Commission approved. However, the Commission has no authority to change the terms of Verizon's interconnection agreements or purporting to override federal law.

While Petitioners claim they "urgently" need relief, (Complaint and Petition at 3), they have not established any grounds for their complaint. First, they do not allege that they have interconnection agreements with Verizon, and therefore have no standing to make their claim. Second, not surprisingly, they do not allege that they have ever ordered from Verizon any of the "unbundled loops, transport, and switching network elements" they claim to be unable to live without, and that form the only basis for the extraordinary relief they seek. The elimination of these UNEs, therefore, could impose no harm on these carriers, and for this reason alone the Complaint and Petition should be dismissed.

Moreover, Verizon has made it clear that: (1) it will continue to provide existing services to CLECs either on a resale basis under section 251(c)(4) or pursuant to commercial agreements, and (2) it will provide CLECs with at least 90 days' notice, from the issuance of the D.C. Circuit's mandate, before moving CLECs to alternatives to UNEs. In short, Verizon will not disconnect any CLEC as a result of issuance of the mandate, unless the CLEC itself chooses that option. Thus, there will not be any "market disruption" (Complaint and Petition at 3) - even as to CLECs that do purchase UNEs from Verizon.

The Complaint and Petition, which do not allege any actual violation of any Commission-enforceable statute or regulation, should be denied.

ARGUMENT

In the *Triennial Review Order*, the FCC promulgated new unbundling regulations to replace the regulations that the D.C. Circuit vacated in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). *See* Report and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 705 (2003) ("*Triennial Review Order*") (finding that, as a result of *USTA I*, the prior rules "no longer exist"). A number of Verizon's interconnection agreements in Illinois automatically incorporated those new regulations, without the need for amendments to those agreements.

On March 2, 2004, the D.C. Circuit issued its decision in *USTA II*. It affirmed the FCC's decision in substantial part and rejected virtually every challenge the CLECs raised. The D.C. Circuit also vacated certain of the FCC's determinations: specifically, its rules requiring incumbents to unbundle, under 47 U.S.C. § 251(c)(3), mass market circuit switching, high-capacity loops and transport, and dark fiber. *See USTA II*, 359 F.3d at 568, 594.[2] The D.C. Circuit stayed the vacatur of those rules for 60 days and later extended that stay for another 45 days, so that its mandate is now scheduled to issue on June 16, 2004. *See USTA II*, 359 F.3d at 595; Order, *USTA II*, Nos. 00-1012 *et al.* (D.C. Cir. Apr. 13, 2004). Last week, the D.C. Circuit

[2] Petitioners contend that the D. C. Circuit's opinion left intact the FCC's rules requiring unbundling of high-capacity loops. *See* Complaint and Petition at 2, n.2. But the D.C. Circuit made clear that it was vacating all of the FCC's attempts to delegate impairment determinations to the states, *see USTA II*, 359 F.3d at 568, and the FCC made such a delegation in the context of both high-capacity loops and transport, *see Triennial Review Order* ¶¶ 328, 394. Moreover, the D.C. Circuit made clear that it was using the term "transport" to refer to "transmission facilities dedicated to a single customer" — that is, what the FCC defines as "loops" — as well as to facilities dedicated to a "carrier." *USTA II*, 359 F.3d at 573; 47 C.F.R. § 51.319(a) (defining "loop"). The D.C. Circuit's treatment of high-capacity loops and transport was consistent with the manner in which the ILECs briefed the issue, by addressing both simultaneously. And the two substantive flaws the D.C. Circuit identified with respect to the FCC's analysis of high-capacity facilities — considering impairment on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 — apply equally to the FCC's determinations as to both loops and transport, *see Triennial Review Order* ¶¶ 102, 332, 341, 401, 407.

denied requests from the FCC and CLECs for another extension of the stay pending the filing of petitions for *certiorari* with the United States Supreme Court.[3]

Faced with the looming reality of the D.C. Circuit's mandate, Petitioners seek to evade it by asking this Commission to require Verizon to continue offering certain network elements – unbundled high-capacity loops, transport and switching – at TELRIC-based rates "if *USTA II* becomes effective," and notwithstanding federal law or the terms of actual existing agreements. (Complaint and Petition at 2). Specifically, they request a ruling that Verizon must continue to provide these elements as UNEs "unless and until amendments to Verizon's interconnection agreements and Illinois tariffs that alter such obligation are approved by the Commission." (Complaint and Petition at 12).

Petitioners have failed to attach to their pleading either an interconnection agreement that they contend is controlling or the tariff with which they allege Verizon must comply. Instead, the evidence they offer is a "Statement of Petitioners," a document that in their own words has been attached "[f]or illustrative purposes," (Complaint and Petition at 10), and which is nothing more than a generic legal memo that does not mention the Commission, its rules and regulations, or any other fact or law specific to the state of Illinois.[4]

Petitioners' request must be denied and dismissed.

First, the Petitioners have not provided a single interconnection agreement in support of their supposition that Verizon must continue to provide certain network elements as UNEs "unless and until" these agreements are amended and these amendments are approved by the Commission. Indeed, they have not provided any interconnection agreements at all, and this failure is an implicit acknowledgement of what is in fact the case: Verizon has interconnection agreements in Illinois that expressly permit Verizon to cease providing, as UNEs, mass market

[3] Order, *USTA II,* Nos. 00-1012 *et al*. (D.C. Cir. June 4, 2004).
[4] Consistent with their presentation of "evidence," Petitioners' pleading has been verified by their counsel.

circuit switching and high-capacity loops and transport, immediately upon the issuance of the D.C. Circuit's mandate or shortly thereafter. For example, Section 4.7 of Verizon's interconnection agreement with 1-800 Reconex provides:

> Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service, payment or benefit, otherwise required to be provided to Reconex hereunder, then Verizon may discontinue the provision of any such Service, payment or benefit, and Reconex shall reimburse Verizon for any payment previously made by Verizon to Reconex that was not required by Applicable Law. Verizon will provide thirty (30) days prior written notice to Reconex of any such discontinuance of a Service, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.

Contrary to the Petitioners' suggestion, implementing these provisions would not be an improper unilateral change, but rather an action consistent both with the law[5] and with the terms of an interconnection agreement to which both parties agreed, and which this Commission approved.[6] And under federal law, an interconnection agreement, once approved, is "binding." 47 U.S.C. § 252(a). This Commission has no authority to override the terms of any interconnection agreement by requiring Verizon to continue to provide access to UNEs in

[5] Because the FCC's attempts to expand unbundling beyond the reach of the statute have now been struck down by the federal courts three times, there have never been lawful § 251 unbundling rules binding the ILECs and obligating them to provide local mass market switching, high-capacity loops and transport, and dark fiber as UNEs. Accordingly, upon issuance of the mandate, there will not be a "change of law" to eliminate previously lawful rules requiring provision of UNEs, but merely an affirmation that there have never been lawful UNEs rules to change. Verizon does not waive this argument by choosing to follow the administrative processes set forth in its interconnection agreement that apply to actual changes in law..

[6] The *Triennial Review Order's* discussion of transition rules (¶¶ 700-706) cited by Petitioners (Complaint and Petition at 8) does not hold to the contrary. The FCC did not state that the unbundling changes it ordered could not be self-executing under interconnection agreements. *Triennial Review Order* ¶ 700. Instead, the FCC observed that the unbundling provisions of section 251 are implemented "to a large extent" through interconnection agreements between individual carriers. *Id.* The specific language of some Verizon interconnection agreements in Illinois provides for the automatic elimination of network elements when Verizon's legal obligation to provide them ends (as it will when the mandate issues) – either immediately or after a designated notice period.

circumstances where federal law and the parties' interconnection agreements authorize Verizon to stop providing such access.

Any state commission decision purporting to interpret such an agreement that "effectively changes [its] terms" "contravenes the Act's mandate that interconnection agreements have the binding force of law." *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003). Indeed, a state commission that "promulgat[es] a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements," "act[s] contrary to the [1996] Act's requirement that interconnection agreements are binding on the parties." *Id.* at 1125-26. Yet this is precisely what the Petitioners seek from the Commission. But "[t]o suggest that [a state commission] could interpret an agreement without reference to the agreement at issue is inconsistent with [its] weighty responsibilities of contract interpretation under § 252." *Id.* at 1128. It would be even more egregious here when the Petitioners do not even claim any interconnection agreements with Verizon.

Second, Petitioners contend that it is "undisputed" that Verizon "remains legally required" under its "tariff" to provide UNEs "during the interim period before new rules are established." (Complaint and Petition at 4). But Verizon has no such tariff in Illinois. Petitioners' assertion to the contrary – in language taken verbatim from the Complaint and Petition that Petitioners and other CLECs filed against SBC Illinois – suggests either a failure to conduct a mandatory pre-filing investigation or too great an enthusiasm for boilerplate. In any event, Petitioners cannot rely on a tariff that does not exist, nor can this Commission order Verizon to file such a tariff. *See Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003), *cert. denied, WorldCom, Inc. v. Wisconsin Bell, Inc.*, 124 S. Ct. 1051 (2004) (preempting as inconsistent with the Act a state commission order requiring an ILEC to file a tariff offering UNEs at TELRIC rates).

Third, the Commission cannot rely on a four-year old condition in the *Bell Atlantic/GTE Merger Order*[7] to find that Verizon must continue to provide access to UNEs under FCC regulations that were vacated more than fourteen months ago. *See* Complaint and Petition at 10. As an initial matter, although the Petitioners' assertion about this merger condition is incorrect, the Commission need not rule on that claim here. The merger conditions reflect "commitments of Bell Atlantic and GTE" and are "express conditions of [*the FCC's*] approval of the" merger. *Bell Atlantic/GTE Merger Order* ¶ 250 (emphasis added). Not only is this Commission not a party to those conditions, but also enforcement of the merger conditions is *the* FCC's responsibility, not this Commission's. The FCC made this clear, explaining that, "[i]f Bell Atlantic/GTE does not . . . perform each of the conditions, . . . *we must take action* to ensure that the merger remains beneficial to the public." *Id.* ¶ 256 (emphasis added). Other state commissions have likewise recognized that interpretation and enforcement of the merger conditions is a matter for the FCC. *See, e.g.*, Examiner's Report, *Verizon Maine Petition for Consolidated Arbitration*, Docket No. 2004-135, at 10-11 (Me. PUC filed May 6, 2004).

Nonetheless, if the Commission addresses this issue, it should reject the CLECs' interpretation of the merger condition, as did a Hearing Examiner in Rhode Island (indeed, no state commission has accepted it). *See* Procedural Arbitration Decision, *Petition of Verizon Rhode Island*, Docket No. 3588, at 14-15 (R.I. PUC Apr. 9, 2004). Under its plain terms, Verizon's obligation to provide access to UNEs pursuant to the rules promulgated in the *UNE Remand Order*[8] and *Line Sharing Order*[9] ended as of "the date of a final, non-appealable judicial

[7] Memorandum Opinion and Order, *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent To Transfer Control*, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").
[8] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), *vacated and remanded, United States Telecomm. Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).
[9] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, ¶¶ 158-

decision providing that th[ose] UNE[s] . . . [are] not required to be provided." *Bell Atlantic/GTE Merger Order* App. D, ¶ 39. The D.C. Circuit's decision in *USTA I*, which took effect in February 2003 and became final and non-appealable on March 24, 2003, was just such a decision: as the FCC itself found, when *USTA I* became "final and no longer subject to further review . . . the legal obligation [to provide UNEs] upon which the existing interconnection agreements are based *will no longer exist*." *Triennial Review Order* ¶ 705 (emphasis added). In 2000, the Chief of the FCC's Common Carrier Bureau reached precisely the same interpretation of this very merger condition in analogous circumstances, finding that a final and non-appealable court of appeals decision vacating and remanding the FCC's TELRIC rules would eliminate Verizon's obligation under that condition to offer UNEs at TELRIC prices. *See* Letter to Verizon from Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC, 15 FCC Rcd 18327 (2000).

Fourth, Petitioners' passing suggestion that, regardless of *USTA II* and the plain language of the federal Act, this Commission may nevertheless order unbundling of certain network elements pursuant to state law is simply wrong. Petition and Complaint at 8. As a preliminary matter, these carriers do not point to any Illinois statute in support of their assertion. In fact, there is none that applies.

In addition, courts of appeals have repeatedly found that the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the § 252 process that Congress established. *See, e.g.*, *Wisconsin Bell*, 340 F.3d at 443; *Pac West*, 325 F.3d at 1126-27; *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). In the face of existing, binding agreements that affirmatively eliminate certain unbundling obligations once the *USTA II* mandate issues, the Commission could not re-impose those unbundling requirements consistent

160 (1999) ("*Line Sharing Order*"), *vacated and remanded*, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1571 (2003).

with the § 252 process. And the Petitioners, in any event, provide no indication they are willing to follow that process — instead, they seek an immediate order requiring unbundling *before* the FCC has issued a lawful order finding that unbundling is required consistent with binding judicial interpretations of the 1996 Act.

Any attempt to order unbundling on the basis of state law would violate not only the procedural requirements of the 1996 Act, but also its substantive standards. As both the Supreme Court and the D.C. Circuit made clear in vacating the FCC's first two attempts to issue UNE rules, Congress did not require "blanket access to incumbents' networks" or determine that "more unbundling is better." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 390 (1999); *USTA I*, 290 F.3d at 429. Instead, those cases make clear that "'impairment' [is] the touchstone" to any requirement of unbundling. *USTA I*, 290 F.3d at 429. Therefore, under federal law, there must be a valid finding of impairment under § 251(d)(2) *before* an incumbent may be ordered to provide access to a network element as a UNE, at TELRIC rates. And in *USTA II*, the D.C. Circuit held that this impairment determination must be made *by the FCC* and that the authority cannot be exercised by state commissions. *See* 345 F.3d at 565-68. Accordingly, in the absence of a lawful FCC finding of impairment, any state commission order requiring unbundling would be fundamentally *inconsistent* with federal law by requiring unbundling where the 1996 Act, by its terms, does not.

Fifth, the Petitioners do not charge Verizon with any actual violation of any specific statute or interconnection agreement, nor do they express with any specificity precisely why the Commission must take such extraordinary (and unlawful) steps. Instead, they mutter phrases such as "tremendous uncertainty" and "market disruption." But Petitioners never explain how this uncertainty and disruption might come to pass – or how, without interconnection agreements and no UNEs from Verizon, it could ever apply to them.

There will be no immediate impact on existing service arrangements from the issuance of the *USTA II* mandate. After this mandate issues, those CLECs in Illinois that are currently ordering UNE-P from Verizon can continue providing service to end-user customers on a resale basis under § 251(c)(4), under special access tariffs or pursuant to commercial agreements. As a framework for commercial negotiations, Verizon has announced its Wholesale Advantage, which provides all elements available today under UNE-P arrangements — and makes available additional services, including voice mail and DSL service — at a commercially reasonable price.

Verizon has no intention of disconnecting any CLEC's services upon issuance of the D.C. Circuit's mandate, unless, of course, the CLEC chooses that option.[10] Verizon will, moreover, give CLECs ample notice — after issuance of the mandate — of the move to service at resale rates, in the event the CLEC does not opt for a commercially negotiated arrangement. In fact, Verizon will give more notice than its interconnection agreements require. Specifically, Verizon will give CLECs 90 days' notice, from the issuance of the D.C. Circuit's mandate, of the transition mechanism and will continue accepting orders for the affected services during those 90 days. The service alternatives Verizon is making available, along with the generous transition periods, will ensure uninterrupted service to CLECs and their customers, provided that is what CLECs want.

However, with respect to Petitioners who claim no interconnection agreement or the purchase of any UNEs from Verizon none of this will have any effect on them.

For all of these reasons, Petitioners have failed to state a claim for which relief can be granted. The Complaint and Petition should be dismissed.

[10] Of course, Verizon retains its existing rights to discontinue service to CLECs that fail to pay undisputed charges for the services they use or that otherwise materially violate the terms of their interconnection agreements.

Respectfully submitted,

VERIZON NORTH INC. AND
VERIZON SOUTH INC.

By: _____
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CERTIFICATE OF SERVICE

I, Sarah A. Naumer, hereby certify that I served a copy of the Answer and Motion to Dismiss of Verizon North Inc. and Verizon South Inc. upon the service list in Docket No. 04-0421 by email on June 7, 2004.

Sarah A. Naumer